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No. 82-242

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ANNE M. GORSUCH, Administrator,
ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

vs.

SIERRA CLUB and
ENVIRONMENTAL DEFENSE FUND,
Respondents.

BRIEF OF RESPONDENT ENVIRONMENTAL DEFENSE FUND IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals abused the discretion expressly conferred upon it by the Clean Air Act by making an award of attorneys' fees in this case based upon its finding that the litigation furthered the goals of that Act.

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STATEMENT

The Statement set forth in the Petition[1] omits several pertinent aspects of this case and mischaracterizes the degree of success achieved by the Environmental Defense Fund and the Sierra Club. First, it fails to set forth adequately the sheer volume and complexity of the litigation. As summarized by the Court of Appeals,

[1] Citation references to the Petition will be abbreviated "Pet". Respondent Environmental Defense Fund will be referred to as "EDF" and petitioner will be referred to as "EPA".

> The technical complexity of the case necessitated extensive preparation by the parties and the court. In formulating the regulation, EPA had prepared 120 studies, collected 400 items of reference literature, received almost 1,400 comments, written 650 letters and 200 interagency memoranda, held over 50 meetings and substantive telephone conversations with the public, and conducted four days of public hearings. The statement accompanying the regulation took up to 43 triple columns of single-spaced type. Approximately 700 pages of briefs were submitted to this court on the merits of the case. The joint appendix contained 5,620 pages, bound in twelve volumes. The certified index to the record listed over 2,520 submissions. Seven months after oral argument, this court emerged with a 250 page opinion upholding the agency's regulations.
>
> *Sierra Club* v. *Gorsuch*, 672 F.2d 39-40 (D.C. Cir. 1982); Pet. at 14a-15a (footnote omitted).

After analyzing this massive record, the Court of Appeals was in a uniquely appropriate position to assess the contribution of the parties toward the resolution of important and complex issues.

Second, the EPA petition largely ignores several significant consequences of the Court of Appeals' ruling on the merits. In responding to EDF's challenges to EPA's conduct, the Court of Appeals held that both due process and the new rulemaking procedures of section 307 of the Clean Air Act, 42 U.S.C. § 7607, require EPA to comply with three requirements concerning oral communications after the close of the comment period. First, EPA must docket all such communications which it considers to be "of central relevance to the rulemaking." *Sierra Club* v. *Costle*, 657 F.2d 298, 402 (D.C. Cir. 1981). Second, meetings with other executive branch officials need not

be docketed where they involve policy discussions only and EPA does not seek to rely on any "information or data" arising from such meetings. *Id.* at 404-07. Third, the Court held that congressional contacts with the Agency will not invalidate a rulemaking where the communications focus on the substance of the proposed rule itself and do not include any effort designed to force the Agency to consider factors "not made relevant by Congress in the applicable statute." *Id.* at 408-10.

Although the Court of Appeals concluded, on the basis of the factual record, that these standards had not been violated in the present case, it also noted that much of the information necessary to make that determination was unearthed only as a result of EDF's efforts during the pendency of the appeal. 672 F.2d at 41; Pet. at 18a. Equally important, procedures for informal rulemaking for the entire executive branch have been altered, apparently in direct response to the Court of Appeals ruling in this case. On June 11, 1981, David A. Stockman, Director of the Office of Management and Budget, issued a memorandum to the heads of executive departments and agencies setting forth procedures to be followed for transmission of factual communications to agencies engaged in informal rulemaking.[2] (App. A, 1a-2a.) The memorandum sets forth measures to ensure that factual communications received by OMB from the public will also be transmitted to the agency "for inclusion in the rulemaking record" and admonishes that the "agencies receiving such materials from the public should take care to see that they are placed in the record." (App. A, 1a.) The memorandum also addresses the question of factual material developed by OMB itself, and states that "such material, when submitted to an agency for its consideration, will be identified as material appropriate for the whole record of the agency rulemaking." (App. A, 2a.) Finally, the memorandum emphasizes that "our procedures will be consistent with the holding of and policies discussed in *Sierra Club* v. *Costle*,"

[2] A copy of the Memorandum is attached hereto as Appendix A (hereafter "App. A").

which had been decided a few months earlier. The "Stockman memorandum" cites no legal authority other than the Court of Appeals' ruling in this case and it addresses issues which were raised in this case only by EDF.

Finally, on the basis of its familiarity with the record, the Court of Appeals was able to assess the contribution made by each of the respondents in resolving a case which all the parties recognized to be of national importance. 672 F.2d at 39; Pet. at 14a. As the Court noted, it was totally dependent upon Sierra Club to brief and advocate certain issues, and EPA was significantly assisted by Sierra Club's support in defending certain aspects of the regulation in face of an industry challenge. 672 F.2d at 41; Pet. at 17a. Similarly, the Court applauded the "critical role played by EDF in the Court's premier interpretation of the rulemaking procedures laid down in the 1977 Amendments" of the Clean Air Act. 672 F.2d at 41; Pet. at 17a. After noting EDF's contribution, involving factual research and legal analysis, and that several documents relating to post-comment period contacts with EPA were made available to the public for the first time as a result of EDF's challenge, the Court stated it had "little doubt that without EDF's substantial contribution to this aspect of the case, our deliberations would have been less enriched and more time consuming." 672 F.2d at 41; Pet. at 18a. The consequences of this litigation and respondents' contributions thereto formed the basis of the Court of Appeals' conclusion that the respondents had furthered the goals of the Clean Air Act and, hence, that a fee award was "appropriate."

SUMMARY OF ARGUMENT

Certiorari should be denied herein for several reasons. First, the decision of the Court of Appeals to award attorney fees in this case was an exercise of discretionary authority conferred upon it by the Clean Air Act and accordingly is subject to review only for an abuse of that discretion. This Court stated in the *Alyeska Pipeline* case, 421 U.S. 240 (1975), that Congress determines the scope of the court's discretion to award fees. In this case, Congress conferred authority on the

court to make such an award under the Clean Air Act "whenever it determines that such an award is appropriate." 42 U.S.C. § 7607(f) (Supp. IV 1980). Congress consciously rejected any limitation of awards to parties who "prevailed" or who only "prevailed in part." The proper standard, explicitly suggested in the legislative history of the Act and applied by the Court of Appeals, is for the court to determine whether the litigation furthered the goals of the Clean Air Act. This standard has been accepted and approved by every federal court which has addressed the issue. In contrast, EPA suggests that the discretion of the courts is limited to awarding fees to "successful" litigants, but no court or legislative committee has ever expressed that interpretation. Moreover, the clear expression of congressional intent to authorize discretionary "fee shifting" and waive sovereign immunity overcomes the generalized rules of construction based upon sovereign immunity relied upon by EPA. Certiorari should thus be denied because the issue presented involves an exercise of discretion clearly within the authority of the Court of Appeals, based upon the factual record before it.

Second, certiorari should be denied because, under the proper standard, the decision below was sound. The litigation furthered the goals of the Clean Air Act by furthering proper implementation of the Act, resulting from early judicial guidance with respect to novel and complex issues. Moreover, this litigation produced "tangible accomplishments" and was "successful" in requiring EPA to divulge the factual circumstances of EPA contacts with the public, other executive branch officials and members of Congress, so that the propriety of those meetings could be assessed. Furthermore, in assessing those issues, the court established new standards for informal rulemaking, under which certain kinds of communications must be docketed in the rulemaking record. That ruling led promptly to a change in procedures for all executive branch agencies, apparently on the basis of the Court of Appeals' decision in this case. Finally, to use EPA's expression, the action was "legitimate" in that it involved important and

complex issues in regulatory schemes of national importance. Moreover, due to EPA's withholding of factual information with regard to outside contacts, EDF could not determine, at the outset of the case, the nature and substance of those contacts; thus, EDF had legitimate reason to bring this action. EDF's efforts succeeded in producing important and substantial benefits to the public.

Third, certiorari should be denied because the decision below will affect few other cases or parties. EPA's "floodgates of litigation" rhetoric ignores reality. Although fourteen fee award statutes using the identical standard were enacted several years ago and the courts have agreed upon the interpretation of those laws, fee awards to parties who do not "substantially prevail" are very rare. In fact, under those statutes, fees have occasionally been denied to a prevailing party. In short, the courts have handled the discretion conferred upon them in a sound manner and there is no important reason for this Court to review this case.

ARGUMENT

I. CERTIORARI SHOULD NOT BE GRANTED TO REVIEW AN EXERCISE OF DISCRETION.

A. The Clean Air Act Confers Broad Discretion on the Courts to Make Attorney Fee Awards.

In its Petition for Writ of Certiorari, EPA seeks this Court's review of an award of attorney fees under section 307(f) of the Clean Air Act (the "Act"). 42 U.S.C. (Supp. IV) § 7607(f). Although the Petition does not specifically rely on any of the characteristic reasons for granting review set forth in this Court's rules, EPA appears to contend that this case raises "an important question of federal law which has not been, but should be, settled by this Court." Sup. Ct. R. 17.1(c). Petitioner inaccurately describes EDF and Sierra Club as "totally unsuccessful" in this litigation, Pet. at 15, and contends that the Court of Appeals lacked authority under the Act to award fees "to parties who do not prevail on any claim." Pet. at 14. Yet no court or legislative report has ever endorsed that interpretation

of the law. In fact, the question of entitlement to a fee award is clearly one which Congress has committed to judicial discretion and petitioner's remedy, if any, lies with Congress and not the courts. It would be wasteful of this Court's time and resources to review the massive record herein to determine whether, on the facts, there has been an abuse of discretion in this case.

There can be no serious question that the Court of Appeals had the authority to determine whether to make an award of fees in this case. Section 307(f) of the Act broadly provides, in part:

> In any judicial proceeding under this section, the court *may* award costs of litigation (including reasonable attorney ... fees) whenever *it determines* that such award is *appropriate.*
>
> 42 U.S.C. § 7607 (f) (Supp.IV 1980) (emphasis added).

This statutory language unmistakably grants the court the power to decide whether to make an award and indicates that the authority conferred is discretionary.

Prior decisions of this Court have recognized that the scope of discretion conferred upon the courts under fee award statutes is for Congress to determine. In *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975), this Court reversed an award of attorney fees for lack of statutory authorization, noting that various kinds of fee award statutes had been enacted and stating:

> Under this scheme of things, it is apparent that the *circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine.*
>
> 421 U.S. at 262 (emphasis added).

While describing the various federal statutes which authorize fee awards, this Court recognized, in *Christiansburg Garment*

Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978),[3] that

> [s]ome of these statutes make fee awards mandatory for prevailing plaintiffs; others make awards permissive but limit them to certain parties, usually prevailing plaintiffs. *But many of the statutes are more flexible*, authorizing the award of attorney's fees to either plaintiffs or defendants, and *entrusting the effectuation of the statutory policy to the discretion of the district courts.**
>
> * *See, e.g.*, ... Clean Air Act, 84 Stat. 1706, 42 U.S.C. § 1857h-2(d) ... [i.e. § 304(d) of the Act, authorizing district court fee awards in terms identical to § 307(f)].
>
> 434 U.S. at 415-16 (certain footnotes omitted, emphasis added.)

By the terms of section 307(f) of the Act, Congress plainly did not limit fee awards to certain parties depending on their degree of "success." Rather, "it entrust[ed] the effectuation of the statutory policy to the discretion of the ... courts." The significance of this point is reinforced by the legislative history. It reflects that on two separate occasions Congress consciously selected the current statutory provision over an alternative which would have limited the parties eligible for fee awards and restricted the discretion of the courts. In 1976, the Senate passed a bill, S. 3219, which contained the following provision:

> In any judicial proceeding under this Act in which the United States or an officer or employee thereof is a party (other than as an intervenor), any party other than the United States which *prevails* in such action

[3] The Court in *Christiansburg Garment* faced the question of the proper standard for fee awards to prevailing defendants under a statute authorizing an award to the prevailing party only. The important point is the Court's recognition of the varying "flexibility," as determined by Congress, provided under different statutes. The discretionary nature of fee awards under section 304(d) of the Act was also recognized in the *Alyeska* case, 421 U.S. at 261 n.35.

> *shall* recover from the United States the reasonable costs for such party's participation in such proceeding, including reasonable attorney's fees, expert witness fees, and the costs of any studies, analyses, tests, or engineering reports that the court finds were necessary to litigate such action. In any case in which such party *prevails in part*, the court shall have *discretion* to award such reasonable costs.
>
> S.3219, 94th Cong., 2d Sess. § 35 (1976) *reprinted in* A Legislative History of the Clean Air Act Amendments of 1977 at 4689 (1978) (hereafter "Legislative History") (emphasis added).

The House, however, passed a bill with a provision identical to the version finally enacted, and in the Conference Committee the House version prevailed. H.R. 10498, 94th Cong., 2d Sess. (1976), *reprinted in* Legislative History at 6071; H.R. Rep. No. 94-1742, 94th Cong., 2d Sess. (1976), *reprinted in* Legislative History at 4401.

Since the 1976 Conference Committee amendments did not pass during the 94th Congress, various bills were reintroduced the following January, including two bills introduced in the Senate. S.252 contained a fee award provision identical to the version rejected by the Conference Committee in the preceding Congress. S.252, 95th Cong., 1st Sess. §36 (1977), *reprinted in* Legislative History at 3644. In contrast, S.253 provided that the court "may" award reasonable attorney fees "whenever it determines that such an award is appropriate." S.253, 95th Cong., 1st Sess. §36 (1977), *reprinted in* Legislative History at 3817. The Senate Committee opted for the latter provision, which ultimately was enacted.

The congressional choice between these provisions is important in two respects. First, the rejected provision would have limited the discretion of the courts by mandating awards to prevailing parties. Second, the rejected provision would have limited awards to "prevailing" parties and parties who

"prevail in part". By rejecting the narrower provision, Congress evinced an intent to confer broad discretion to make or deny fee awards, even where the potential recipient did not "prevail in part". This choice was made on two separate occasions by different committees of different Congresses.

The significance of Congress' rejection of any "prevailing party" (or "prevailing in part") limitation is further emphasized by the broad interpretation which the phrase "prevailing party" had, by 1977, received in the courts. Petitioner concedes that the term had been construed by district courts to include parties who "prevail" by settlement rather than by litigated judgment, Pet. at 20 n.15, and that interpretation has been confirmed by this Court. *Maher* v. *Gagne*, 448 U.S. 122 (1980). The Petition does not refer to the fact that, in some cases, fee awards had been made prior to 1977 to parties who received little or none of the relief claimed, even under "prevailing party" standards. *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970); *Richards* v. *Griffith Rubber Mills*, 300 F. Supp. 338 (D. Oregon 1969).[4] It

[4] In *Parham* plaintiff sought an award of back pay and injunctive relief for the class he represented on the basis of alleged discriminatory hiring practices. Although the court found that unlawful discriminatory practices had at one time existed, it denied injunctive relief due to good faith efforts by defendant to remedy the violation. Moreover, the claim for back pay was denied because the court found that plaintiff had not been denied employment on the basis of race. Although no relief was awarded, the court awarded fees on the basis that the lawsuit had acted as a catalyst to remedial action and plaintiff had performed a public service by establishing the Title VII violation.

In *Richards*, plaintiff claimed that she had unlawfully been denied a promotion on the basis of sex and sought an order requiring the promotion, back pay, and an injunction. The court found the denial to have violated 42 U.S.C. §2000e-2(a), but denied back pay and injunctive relief on the basis of defendant's good faith reliance on a state regulation. The court did not order a promotion since it found at the time of the decision plaintiff occupied the position she originally sought. After noting that the statute authorized a fee award to the "prevailing party" in the court's discretion, the court awarded plaintiff attorney fees of $250.

(footnote continues)

is unnecessary in the present case to resolve whether those cases properly interpret the "prevailing party" standard; since that standard is absent from the Clean Air Act its interpretation is not involved in this case.[5] The cases cited are indicative, however, of the broad interpretation given that standard. Hence, the fact that Congress consciously rejected any form of "prevailing party" limitation for the Clean Air Act, despite the

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(footnote continued)

As EPA points out, both *Parham* and *Richards* were mentioned by Senator Tunney following his statement that fee awards under the Toxic Substances Control Act, worded identically to section 307(f), are to be made "where such award is in the public interest without regard to the outcome of the litigation." 122 Cong. Rec. 8301 (1976). EPA contends that in all the cases cited by Senator Tunney, the plaintiffs prevailed in some sense or conferred a tangible benefit upon the class they represented. Pet. at 23 n.16. That analysis seems implausible in light of the facts of the cases. Moreover, even if it were so, petitioner ignores the fact that *Richards* and *Parham* were decided under "prevailing party" standards, and the other two cases, *Kopet* v. *Esquire Realty Co.*, 523 F.2d 1005 (2d. Cir. 1975) and *Thomas* v. *Honeybrook Mines, Inc.*, 428 F.2d 981 (3rd Cir. 1970), *cert. denied*, 401 U.S. 911 (1971) involved fee awards based not on statute, but on the traditional equitable basis that plaintiffs had conferred a "common benefit" on a class which they represented. Thus, although the prevailing party standard had been liberally construed, a finding of some degree of "success" was necessary for fees to be awarded in all four of those cases, in contrast to the approach suggested by Senator Tunney and taken under the Clean Air Act. In short, it is clear that Senator Tunney was not citing those cases as an indication of the outer limits of the courts' discretion, as petitioner contends, since they were decided under standards which required some degree of "success" and Senator Tunney was expressing the concept that fees could be awarded "without regard to the outcome of the litigation."

EPA also attaches great significance to Senator Tunney's statement that courts should adhere to existing case law, under which successful plaintiffs ordinarily should receive fee awards. Pet. at 23 n.16. Yet this merely suggests a presumption in favor of successful plaintiffs, not that courts may never award fees to non-prevailing plaintiffs.

[5] For the same reason, this case raises issues totally unlike those presented in *Hensley* v. *Eckerhart*, No. 81-1244 (U.S. Sup. Ct. *cert. granted* Mar. 1, 1982), which involves a "prevailing party" standard and the question raised is whether such a standard requires apportionment where fees are awarded to a party who only prevails in part.

expansive interpretation already given that term, indicates that Congress intended to confer broad authority on the courts to make discretionary fee awards.

Congress was also aware of the liberal interpretation which had been given section 304(d) of the Act, which authorizes fee awards in citizen suit enforcement actions under section 304 of the Act.[6] That provision was enacted in 1970 and is essentially identical to section 307(f). In 1977, the staff of the Senate Committee on Environment and Public Works compared the two Senate bills introduced in that year. With respect to S.252, the Report described the attorney fees provision which amended section 307, but which would have applied to "any judicial proceeding under this Act".[7] This was intended to include citizen suit enforcement litigation under section 304, as is confirmed by the Report's description of the proposal:

> This language covers instances when the Federal Government goes to court to enforce against a pollution source, when a pollution source goes to court to oppose a Federal action, and those instances in which a private citizen goes to court to require that the Federal Government, under the Citizen Suit provisions of the Clean Air Act, act against a pollution source or to enforce, requirements of the Act [sic].
>
> Staff of the Subcommittee on Environmental Pollution of the Committee on Environment and Public Works, 95th Cong., 1st Sess., A Section-by-Section Analysis of S.252 and S.253 Clean Air Act Amendments 37 (Comm. Print 1977), *reprinted in* Legislative History at 3893 (hereafter "Staff Report").

Thus S.252 would have imposed new restrictions on the fee award provision of section 304, which was originally enacted to authorize fee awards "in the public interest without regard to

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[6] See cases discussed in text, *infra*, at 19-21.

[7] See text quoted at 8-9, *supra*.

the outcome of the litigation."[8] In light of these proposed restrictions, the Report notes that one area of controversy related to the provision was:

> Is there any need to modify *the existing judicial practice of awarding fees based on the individual circumstances of each case?*
>
> *Id.*, at 37; Legislative History at 3893 (emphasis added).

The Senate Committee thus squarely faced the issue presented in this case: should the courts' discretion be limited to award fees only to parties who "prevailed in part," or should they be free to make awards, as they had been under section 304, to make awards "based on the individual circumstances of each case?" Clearly, when the Senate Committee chose the fee award provision of S.253, which was identical to the fee award provision under existing section 304(d), it chose to endorse the "existing judicial practice" of broadly discretionary fee awards and to extend it to section 307.

A further indication of congressional intent in rejecting any prevailing party limitation on fee awards is given by the House

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[8] S. Rep. No. 91-1196, 91st Congress, 2d Sess. at 65. Petitioner argues, in part, that section 304 was also intended to be limited to "successful" parties, Pet. at 16-20, largely ignoring the plain thrust of the quoted language, Pet. at 19 n.13, and arguing instead that another section of the report, which contemplates fee awards for parties who bring "legitimate" actions, does not clearly authorize a fee award in this case. Pet. at 18-19. EPA cites no authority for its conclusory statement that "legitimate" actions are limited to those which are "successful," *Id.*, which is contrary to the idea that fee awards are discretionary without regard to the outcome of the litigation. Moreover, as the Court of Appeals found, the expressions of legislative intent in the 1977 Amendments are clear, regardless of the intent with respect to the enactment of section 304 in 1970. 672 F.2d at 35 n.3; Pet. at 3a n.3. Although EPA suggests the Congress intended sections 304(d) and 307(f) to be equally narrow, Pet. at 22, when Congress enacted section 307(f) it considered 304(d) to be broad and intended section 307(f) to be equally broad. This is clear from the fact that Congress in 1977 rejected a version of section 307(f) which would have restricted discretion to award fees under section 304, as discussed in the text.

Report which accompanied the 1977 Amendments. That Report, relied on by the Court of Appeals, states:

> In the case of the section 307 judicial review litigation, the purposes of the authority to award fees are not only to discourage frivolous litigation, but also to encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest. *The committee did not intend that the court's discretion to award fees under this provision should be restricted to cases in which the party seeking fees was the "prevailing party." In fact, such an amendment was expressly rejected by the committee, largely on the grounds set forth in NRDC v. EPA*, 484 F. 2d 1331, 1388 [sic; 1338] (1st Cir. 1973).
>
> H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 337 (1977), *reprinted in* Legislative History at 2804 (1979) (emphasis added).

Petitioner suggests that this language is somehow consistent with its view that fee awards were limited by Congress to successful parties. Pet. at 24-25. Its argument fails to address the express rejection of any "prevailing party" restriction which, it concedes, had received a liberal construction by 1977. Pet. at 20 n.15. Moreover, EPA suggests that the thrust of the Report is limited by the case cited, *Natural Resources Defense Council, Inc.* v. *EPA*, 484 F.2d 1331 (1st Cir. 1973) [hereinafter cited as *NRDC* v. *EPA*], for which EPA suggests a narrow interpretation. But Congress is obviously not bound by *stare decisis* and the citation to *NRDC* v. *EPA* in the House Report was an express adoption of the rationale of that case, not merely its precise holding. In that case, the court held that a fee award was "appropriate" under section 304 for a party which only partially prevailed. The court's reasoning, however, is far broader:

> We are not impressed by the government's argument that because some issues were decided

adversely to petitioners each party should bear its own costs. *The authorizing language of 304(d) permits an award "to any party, whenever the court determines such award is appropriate." This suggests greater latitude even than is found in 28 U.S.C. 2412, which authorizes awards to "the prevailing party." We are at liberty to consider not merely "who won" but what benefits were conferred. The purpose of an award of costs and fees is not mainly punitive. It is to allocate the costs of litigation equitably, to encourage the achievement of statutory goals.* When the government is attempting to carry out a program of such vast and unchartered [sic] dimensions, there are roles for both the official agency and a private watchdog. The legislation is itself novel and complex. Given the implementation dates, its early interpretation is desirable. It is our impression, overall, that petitioners, in their watchdog role, have performed a service.

Were we to believe that the litigation were wholly or in substantial part frivolous, we would not, of course, award costs of any description to petitioners. In such cases, indeed, we reserve the right to award costs and fees in favor of the EPA. *But the challenges here, even those not sustained, were mainly constructive and reasonable.* And petitioners were successful in several major respects; they should not be penalized for having also advanced some points of lesser weight.

484 F.2d at 1338 (emphasis added).

This language indicates the court's view that the touchstone for fee awards under the Clean Air Act is "to encourage the achievement of statutory goals" and that awards may be made for unsuccessful challenges where they are "constructive and reasonable." Although petitioner would limit the House Report to the factual situation in *NRDC* v. *EPA*, in which NRDC

"prevailed in part," petitioner overlooks the fact that Congress consciously rejected precisely such a limitation on two occasions and opted for the broader provision ultimately enacted. In this context it is clear that the House Report adopted the rationale of the First Circuit's opinion and intended that the courts' discretion not be limited to "successful" parties.

EDF does not suggest that the Act confers unfettered discretion on the courts. Rather, EDF contends, and petitioner appears to concede, that the governing consideration is whether the litigation furthered the purposes of the Clean Air Act. Pet. at 9. The Court of Appeals adopted this approach, consistent with this Court's observation that the discretion conferred merely "entrust[s] the effectuation of the statutory policy to the discretion of the . . . courts." *Christiansburg Garment Co.* v. *EEOC, supra,* 434 U.S. at 416. Moreover, the principle that the court's discretion is to be guided by the goals of the Act in question is clearly enunciated in the legislative history of section 307 quoted above. Petitioner's disagreement with the Court of Appeals is essentially over the manner in which the court, in its discretion, applied this standard to the facts of this case.

Petitioner also suggests that the doctrine of sovereign immunity should have influenced the court's decision in this case. Pet. at 13-15. This contention misses the mark. Petitioner concedes that the legislative history of section 307 "clearly demonstrates that Congress meant to waive the government's traditional immunity and to overcome the presumption of the 'American Rule' against fee shifting." Pet. at 15. Nonetheless, petitioner suggests that certain special rules of construction should have governed the Court of Appeals' decision in this case. Pet. at 13-14. However, there is substantial support for the argument that once the government has unequivocably waived immunity from the suit, the only remaining issue is one of statutory construction. *Lehman* v. *Nakshian,* 453 U.S. 156,

171 (1981) (Brennan J., dissenting).[9] Moreover, even if the doctrine of sovereign immunity does require a conservative interpretation of statutory waivers, cases cited by petitioner indicate that the ultimate question is nonetheless one of congressional intent. For example, in *United States* v. *Kubrick*, 444 U.S. 111 (1979), this Court stated, in interpreting the statute of limitations under the Federal Tort Claims Act, that "we should not take it upon ourselves to extend the waiver beyond *that which Congress intended. . . . Neither, however, should we assume the authority to narrow the waiver that Congress intended.*" 444 U.S. at 117-118 (emphasis added, citations omitted). In *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), this Court also interpreted the Federal Tort Claims Act in light of the "broad and just purpose which the statute was designed to effect," 350 U.S. at 68, and stated:

> Of course, when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. *Neither should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it.*
>
> 350 U.S. at 69 (emphasis added).

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[9] The *Lehman* case, upon which EPA relies, Pet. at 14 n.9, held that a plaintiff is not entitled to a jury trial in an action against the government under the Age Discrimination in Employment Act. The case is distinguishable from the present case since the statutory provision waiving sovereign immunity and authorizing actions against the government was silent regarding the right to jury trial, while the section providing a right of action against private employees was later amended to provide such a right expressly. Based on this fact, the Court concluded that it was "unnecessary to go beyond the language of the statute itself" to resolve the case. 453 U.S. at 165. Moreover, the Court found that the legislative history confirmed its reading. *Id.* at 165-68. Finally, in dictum, the majority suggested that even if the legislative history were ambiguous, plaintiff would not be entitled to a jury since sovereign immunity would require the right to a jury to be "affirmatively and unambiguously" stated. *Id.* at 168. In *Lehman*, the statutory language and legislative history gave a clear indication of legislative intent. In the present case, they "affirmatively and unambiguously" indicate that Congress intended to confer discretion on the courts without limiting that discretion to "prevailing" or "successful" parties.

In the present case, it is clear from the statutory language and the legislative history that Congress intended to confer broad discretion upon the courts to make fee awards, without restricting such awards to "prevailing" or "successful" parties. If sovereign immunity does require the application of certain rules of construction, those general rules are more than overcome by the clear showing of congressional intent in this case.

B. There is No Disagreement among the Federal Courts Concerning the Fee Award Provisions of the Clean Air Act.

Every federal court which has considered the issue has concluded that Congress did not intend to deny the courts the power to make fee awards to non-prevailing parties, in their discretion. These courts have concluded that the governing standard is whether the litigation furthered the goals of the Clean Air Act. As a result, the government's current interpretation lacks support in any case law.

Several decisions have considered the question of the proper interpretation of the fee award provisions of the Clean Air Act and reached the same conclusion as the Court of Appeal's decision herein. *Northern Plains Resource Council* v. *EPA*, 670 F.2d 847 (9th Cir. 1982); *Alabama Power Co.* v. *Gorsuch*, 672 F.2d 1 (D.C. Cir. 1982); *Metropolitan Washington Coalition for Clean Air* v. *District of Columbia*, 639 F.2d 802 (D.C. Cir. 1981); *NRDC v. EPA*, 484 F.2d 1331 (1st Cir. 1973); *Delaware Citizens for Clean Air, Inc.* v. *Stauffer Chemical Co.*, 62 F.R.D. 353 (D. Del. 1974); *Citizens Association of Georgetown* v. *Washington*, 383 F.Supp. 136 (D.D.C. 1974), *rev'd on other grounds*, 535 F.2d 1318 (D.C. Cir. 1976).

In the *Northern Plains Resource Council* case, the Ninth Circuit awarded fees to a petitioner which had unsuccessfully challenged EPA's issuance of a permit under the Clean Air Act.

In awarding fees under section 307 of the Act, the court stated the governing principle as follows:

> [I]n determining whether a party—prevailing or non-prevailing—can recover attorney's fees under § 307(f) from the Government, the test is "whether in light of what was known . . . when the action was instituted, the action was of the type Congress sought to encourage when it authorized awards of attorneys' fees."
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> 670 F.2d at 848 (citation omitted).

The Court concluded that an award of fees was appropriate because petitioner "brought this suit to promote the quality of air resources, and because the suit presented issues important to the construction of the Clean Air Act . . .." 670 F.2d at 849.

In *Delaware Citizens for Clean Air, Inc.* v. *Stauffer Chemical Co., supra,* the court considered an application for attorney fees by a citizens group which had challenged unsuccessfully the defendant's right to emit sulfur dioxide above certain levels. In concluding that an award of fees was inappropriate under section 304 of the Act, the court observed that a limitation of awards to a prevailing party was "notably missing" from the Act, but adopted the following approach in assessing the appropriateness of a fee award:

> The legislative history regarding Section 304 provides little guidance for determining when award of counsel fees is "appropriate." I think it is fair to conclude from the language chosen by Congress that *ultimate success in a citizen's suit was not intended to be a prerequisite to an award.* At the same time, however, in light of the absence of any more specific declaration of congressional intent, I believe that "appropriate" should be read in the context of the pre-existing notions about the circumstances under which one party may fairly be required to bear his adversary's costs of litigation. In this context it seems to this

> Court that success or failure must be given substantial weight and that an award of counsel fees to a losing party should be reserved for those cases in which either the litigation, though ultimately unsuccessful, *serves the objectives of the Act in some substantial way or in which other exceptional circumstances tip the balance of the equities decidedly in the losing party's favor.* The exercise of the *equitable judgment* thus called for must be made in light of all the actions of both parties during the course of litigation as well as during the relevant preceding period.
>
> 62 F.R.D. at 355 (emphasis added, footnote omitted).

The court concluded that a fee award was not appropriate on the facts of the case because the suit had not induced the defendant to act in some way which benefitted the public, nor had it "in any other tangible or direct way contributed to achievement of the objectives of the Clean Air Act." 62 F.R.D. at 355. Such is not the case herein.

In *Citizens Association of Georgetown* v. *Washington, supra,* plaintiffs sought to prevent completion of two private construction projects on the Georgetown waterfront in an action brought under section 304 of the Act. Although plaintiffs were unsuccessful in their suit, the court concluded that the case was "an exceptional case" in which a fee award was appropriate. The court reviewed the statutory language and legislative history and reasoned that "success or failure on the merits has nothing to do with the trial court's *power* to award costs and attorneys' fees in citizen suits under the Clean Air Act." 383 F.Supp. at 144 (emphasis in original). Accordingly, the court concluded that "an award is appropriate if the suit has benefited the public interest as declared in the Clean Air Act." 383 F. Supp. at 144. The court further reasoned that "the advancement of an important legislative policy may justify the award of

costs and fees even where the plaintiff does not obtain the ultimate relief he seeks." 383 F.Supp. at 144.

Despite this unanimity of authority, petitioner argues that there is a "general presumption" against fee awards to "unsuccessful" litigants, Pet. at 14-15, but cites no support for that proposition. Indeed, the petitioner manufactures this "general presumption" out of whole cloth. Specifically, in the first sentence of this argument the Petition observes that attorney fees "generally are not available to parties who do not prevail on any claim." Pet. at 14. That statement is obviously true, since most fee award statutes are limited to "prevailing parties" and, even in cases where courts have the discretion to award fees to non-prevailing parties, such awards are highly unusual. But in the second sentence of the argument this bland generalization is elevated to the status of a "general rule." Pet. at 15. Finally, in the last sentence of the paragraph the "general rule" has become a "general presumption." *Id.* The only support cited for the existence of this "general presumption" is a statement in a lone dissenting opinion by Judge Wilkey in *Alabama Power* v. *Gorsuch*,[10] 672 F.2d at 13; Pet. at 14 n.10.

Based on this scanty support, and after conceding that section 307 was intended to waive sovereign immunity, petitioner proceeds to an astonishing statement: "Nothing in the language or legislative history of Section 307(f) suggests that attorneys' fees may be assessed against the government in favor of unsuccessful suitors." Pet. at 15. That statement totally ignores the plain thrust of the statutory language and the

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[10] *Alabama Power* was decided by the United States Court of Appeals for the District of Columbia Circuit, which chose to rule contrary to Judge Wilkey's views not only in *Alabama Power* itself, but also in that Court's decision in this case and in *EDF* v. *EPA*, 672 F.2d 42 (D.C. Cir. 1982), *Metropolitan Washington Coalition for Clean Air* v. *District of Columbia*, 639 F.2d 802 (D.C. Cir. 1981), and *Montgomery Environmental Coalition* v. *Costle*, 646 F.2d 595 (D.C. Cir. 1981).

overwhelming evidence of the legislative history discussed above, all of which indicate that the courts may, in their discretion, award fees to non-prevailing parties against the government in an appropriate case. Specifically, it ignores evidence that: (1) Congress intended to put the government on an equal footing with private litigants under the Clean Air Act, Staff Report at 37, Legislative History at 3893; (2) Congress clearly intended to waive sovereign immunity and the presumption in favor of the "American Rule" in fee award litigation and, in the same Report, expressly rejected any limitation to "prevailing parties", H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 337 (1977), *reprinted in* [1977] U.S. Code Cong. & Adm. News 1077, 1416; and (3) on two occasions, Congress consciously rejected a limitation of fee awards to only those parties who "prevail" or "prevail in part." (See text, *supra*, at 8-9.) Contrary to the petitioner's imagined "presumption," it is clear that, under section 307(f) of the Clean Air Act, Congress intended that the government, as well as private litigants, pay attorney fees when the courts in their discretion consider them justified.

C. Certiorari Is Inappropriate Because the Court of Appeals' Exercise of Discretion Turned On The Facts of The Case.

Since it is plain that the Court of Appeals had the power to make an award of fees herein, the only remaining issue is whether, on the facts of the case, the court abused its discretion in doing so. EDF contends that certiorari should not be granted to review such discretionary determinations based on a factual record.[11] As stated in *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) this Court should "not grant a certiorari to review evidence and discuss specific facts." To conduct such

[11] As demonstrated in the following section, the Court of Appeals properly exercised its discretion and made a sound decision on the basis of the record before it. Moreover, even if this Court would have ruled differently on those facts in the first instance, EPA's Petition is not an appropriate vehicle for this Court to do so. *Magnum Import Co.* v. *Coty*, 262 U.S. 159, 163 (1923) ("The jurisdiction [of the Supreme Court to review cases by certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing.")

a review in this case would require this Court to review an enormous record. Without such an analysis, this Court would be unable to assess the contribution made by EDF and Sierra Club to the objectives of the Clean Air Act. Since EPA concedes that an award of fees does not require success in the form of a court judgment, Pet. at 16, this Court would be required to weigh the significance of the effects of this litigation in other respects. These include the disclosures of factual information required of EPA at the behest of EDF, the changes in executive branch informal rulemaking procedures also resulting from EDF's participation in this case, and the degree of clarification of complex technical and legal issues addressed by the Sierra Club. Even if this Court, after reviewing the voluminous record, were to come to a conclusion different from that of the Court of Appeals, it seems unlikely that the ruling at the conclusion of such an undertaking would be of sufficient import to justify the effort.

II. THE COURT OF APPEALS' DECISION REPRESENTS A SOUND EXERCISE OF THE COURT'S DISCRETION UNDER THE CLEAN AIR ACT.

The petitioner appears to concede that the proper standard in determining fee awards under the Clean Air Act is whether the litigation substantially contributed to the goals of the Act. Pet. at 9. However, the Petition inaccurately suggests that the Court of Appeals reasoned that judicial interpretation of the statute was, in itself, a goal of the Act. *Id.* Finally, the Petition cryptically describes in two sentences the court's analysis of the manner in which the respondents furthered the goals of the Act in this case. Pet. at 7.

The Court of Appeals recognized that the litigation herein furthered the goals of the Act in several respects, each of which was identified by Congress in the legislative history. First, the House report which accompanied the 1977 amendments explicitly sought to "*encourage litigation* which will *assure proper implementation and administration of the act* or otherwise serve

the public interest." H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 337 (1977), *reprinted in* Legislative History at 2804 (emphasis added); 672 F.2d at 41. Second, in assessing the meaning of the term "appropriate" the court considered the language of the First Circuit in *NRDC v. EPA*, supra, explicitly approved by the House Report, in which the court observed that "[t]he legislation is itself complex and novel. Given the implementation dates, *its early interpretation is desirable.*" Pet. at 5a; 484 F.2d at 1338 (emphasis added). By establishing the procedural requirements of section 307, on which EDF based its challenge, Congress also sought to restrain "broad administrative discretion . . . by thorough and careful procedural safeguards that insure an effective opportunity for public participation in the rulemaking process." H.R. Rep. No. 95-294, *supra, reprinted in* [1977] U.S. Cong. & Admin. News 1077, 1398.

The Court of Appeals acknowledged the importance of these considerations in its ruling on a fee award and recognized that, although litigation is not an end in itself, Congress clearly and repeatedly emphasized the important role that litigation such as this should play in assuring the proper implementation of the Act.[12] In assessing whether an award was appropriate on the facts of this case, the court observed that this case represented the first interpretation of the new rulemaking procedures established by the 1977 amendments to the Clean Air Act. 672 F.2d at 41. In addition, the court considered the importance of

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[12] As the Second Circuit observed in *Friends of the Earth* v. *Carey*, 535 F.2d 165, 172-73 (1976), *cert. denied*, 434 U.S. 902 (1977):

> In enacting § 304 of the 1970 Amendments, Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests . . . .
>
> Thus the Act seeks to encourage citizen participation rather than to treat it as curiosity or a theoretical remedy . . . . As additional encouragement the Act expressly authorizes courts to award costs of litigation to any party when "appropriate," § 304(d).

the case (Pet. at 13a—15a), the technical complexities of the issues involved (Pet. at 17a), and the importance and difficulty of the legal issues presented (Pet. 17a - 18a). Petitioner ignores the fact that the Court of Appeals found that, in certain respects, both the Sierra Club and EDF were successful. With respect to the industry challenge to the EPA standard, which Sierra Club and EDF both opposed, the court noted:

> [T]he argument pressed most intensely by the utilities, that a 90% reduction in sulphur emissions was technologically unfeasible given the state of antipollution technnology, would have been far less completely aired without Sierra Club's participation. The various parts of a complex rule like this one do not travel alone, and the court's education on each part of the rule informed its decisions on other parts.
>
> 672 F.2d at 41; Pet. at 17a.

The court further noted that:

> EDF's contribution involved factual research into meetings and communications between agency officials, White House personnel, members of Congress and industry representatives, as well as a legal analysis of the propriety of such meetings under the new section 307 and existing case law on *ex parte* contacts in rulemaking. Several documents pertaining to these contacts, proferred by EPA for the first time on appeal, were consulted by the court. . . . We note too that EDF's procedural challenges not only clarified how the new section 307(d) would operate, but apparently provided fuel for discussion about appropriate restrictions on *ex parte* comments in other administrative proceedings. *See* Stockman Memorandum For Heads of Executive Departments and Agencies. 2 (June 13, 1981).
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> 672 F.2d at 41; Pet. at 18a (emphasis added).

Petitioner makes absolutely no mention of these aspects of the court's findings in characterizing the respondents as "totally unsuccessful" in this litigation.

Indeed, based upon the Court of Appeal's findings, it is apparent that this case meets the standards which petitioner would impose upon fee awards. Petitioner suggests, at various points, that, in order for the Court to be authorized to make a fee award, the recipient must have made some "tangible accomplishment," brought a "legitimate action" and been "successful" to some extent. Pet. at 16-18. Although the petition does not discuss it, the discovery revelations required of EPA as a result of the litigation indicate a "tangible accomplishment." In addition, the fact that informal rulemaking procedures for all executive branch agencies were changed to ensure compliance with the Court of Appeals ruling in this case indicates a substantial degree of "success." In fact, the Stockman Memorandum by itself rebuts the petitioner's suggestion that respondents were "totally unsuccessful" in this litigation. Moreover, the court's finding that respondents have engaged in good faith litigation of important and complex legal issues indicates that the action was "legitimate." Accordingly, even under the government's standard a fee award was within the ambit of the court's discretion in this case.

III. CERTIORARI SHOULD BE DENIED BECAUSE THE ISSUE RAISED WILL AFFECT FEW OTHER PARTIES OR CASES.

The petitioner raises a "floodgates of litigation" argument, suggesting that the decision below will give rise to what it considers unproductive litigation under the Clean Air Act and identically worded statutes. Pet. at 8-9 and 8 n.4. This argument lacks merit. As the petitioner's citations indicate, for the most part the statutes in question were enacted into law several years ago and, as discussed above, every federal court to consider them, has interpreted these statutory provisions in the same manner, i.e., as conferring broad discretionary authority

on the courts to make fee awards to litigants who further the purposes of the statute without regard to their success in the action. Moreover, as the Court of Appeals recognized in this case, it is extremely rare for a fee award to be made to a party who does not prevail. Although the courts have discretionary power to make such awards, in fact they rarely do so.

The only evidence which the petitioner cites as indicating the rising tide of litigation is a single pending case in which the Energy Action Educational Foundation "is now seeking attorneys' fees." Pet. at 8 n.4. In stark contrast to this lack of decided cases are the cases in which fees have been denied to non-prevailing parties and even, in some cases, to litigants who did prevail. *E.g., Consolidated Edison Co.* v. *Realty Investments Associates,* 524 F.Supp. 150 (S.D.N.Y. 1981) (fees denied prevailing defendant under section 304 of the Clean Air Act); *Carpenter* v. *Andrus,* 499 F. Supp. 976 (D. Del. 1980) (fees denied a prevailing plaintiff under the Endangered Species Act on ground that plaintiff's suit did not advance the statutory purposes); *Delaware Citizens for Clean Air, Inc.* v. *Stauffer Chemical Co.,* 62 F.R.D. 353 (D. Del. 1974) (fees denied to non-profit citizens group which unsuccessfully challenged defendant's right to emit sulfur dioxide above certain levels).

In light of the rarity of fee awards to non-prevailing parties under the Clean Air Act and identical statutory provisions, the decision in this case will have little practical effect upon other cases or litigants. The court in this case did not apply a new standard, but rather applied the statutory interpretation which had been consistently expressed by other federal courts. What was unusual about this case was not the standard applied, but the factual circumstances which led the Court of Appeals to make an award of attorney fees. In this case, although the Court of Appeals awarded judgment to EPA, the guidelines it established as a direct result of EDF's challenge had a significant impact upon future implementation of the Act. Moreover,

EDF's challenge led the government to take the unusual step of adopting new procedural safeguards despite its success in court. Because the Court of Appeals based its decision on these limiting circumstances, it is unlikely that any future litigant who does not prevail will be awarded attorney fees *solely* on the basis of the volume of the record and the complexity of the issues. Accordingly, fee awards to non-prevailing parties should be as rare in the future as they have been in the past. As a result, the decision of the Court of Appeals will have little practical effect on most litigation under the statutes involved and certiorari should be denied.

CONCLUSION

It is a matter of record that the government's opposition to an award of attorney fees to EDF and Sierra Club in this case was the result of a change of administration policy concerning fee awards to non-prevailing parties.[13] 672 F.2d at 34, 41; ____ F.2d at ____; Pet. at 2a, 19a, 24a. In this context, it is not surprising that petitioner is unable to cite any authority, either in case law or legislative history, which directly supports or expresses its interpretation of the applicable statutory provision. Instead, the petitioner relies upon a dissenting opinion for direct support (Pet. at 14 n.10, 19), "notions" concerning fee awards (Pet. at 8), unsupported assertions of what it feels is "surely" or "clearly" the case (Pet. at 9, 10), its view of what litigants "should" expect (Pet. at 12), and "the spirit" of a decision of this Court involving standing under the First Amendment (Pet. at 11 n.6). The lack of authority directly supporting the petitioner strongly suggests that its position is not an indication of what the law is, but merely what petitioner would like it to be. Although a change in policy may alter the government's

[13] Prior to the change of policy, the administrative interpretation of the statute was consistent with the position taken by respondents herein. Accordingly the Court of Appeals' decision did not disturb any long-standing administrative interpretation of the law.

tactics in litigation, it cannot alter the legislative determinations which govern this case.

The fee awards involved in this case have now been in litigation for more than a year and a half. The issues raised herein do not involve difficult or unresolved questions of statutory construction, as indicated by the unanimity of interpretation by the federal courts which have addressed the subject. Further review of this case will only delay unnecessarily payment of the fees to which respondents are entitled.

For the reasons set forth above, respondent Environmental Defense Fund urges this court to deny the Petition for Certiorari.

Respectfully submitted,

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September 27, 1982

EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

Washington, D.C. 20503

June 11, 1981

Embargoed for Release:
6:00 p.m. E.D.T.
June 13, 1981

M-81-9

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: DAVID A. STOCKMAN
DIRECTOR

SUBJECT: Certain Communications Pursuant to Executive Order 12291, "Federal Regulation"

Regulatory relief is one of the cornerstones of President Reagan's program of economic recovery. As an important step in achieving regulatory relief, on February 17, 1981, the President issued Executive Order 12291, "Federal Regulation." This memorandum explains how the Presidential Task Force on Regulatory Relief and the Office of Management and Budget (OMB) will communicate with the public and the agencies regarding proposed regulations covered by E.O. 12291. It also describes certain obligations of the public and agencies in this regard.

A major purpose of the Executive Order is to ensure that, to the extent permitted by law, regulatory decisions are based upon sound analysis of the potential consequences. Toward

this end, a comprehensive factual basis is essential to assist agencies and other interested parties in assessing the economic and other ramifications of proposed regulations.

Under the Executive Order, both the Task Force and OMB will be reviewing factual materials related to regulatory proposals. Both the public and the agencies should understand that the primary forum for receiving factual communications regarding proposed rules is the agency issuing the proposal, not the Task Force or OMB. Factual materials that are sent to the Task Force or OMB regarding proposed regulations should indicate that they have also been sent to the relevant agency. Pursuant to this policy, the Task Force and OMB will regularly advise those members of the public with whom they communicate that relevant factual materials submitted to them should also be sent to the agency for inclusion in the rulemaking record. Accordingly, agencies receiving such materials from the public should take care to see that they are placed in the record.

On occasion, the Task Force staff and OMB will receive or develop factual material which they believe should be considered by an agency during a particular informal rulemaking. In accordance with advice provided by the Department of Justice, such material, when submitted to an agency for its consideration, will be identified as material appropriate for the whole record of the agency rulemaking.

Two additional matters should be noted. First, our procedures will be consistent with the holding of and policies discussed in *Sierra Club* v. *Costle,* No. 79-1565, slip op. at 212-20 (D.C. Cir. April 29, 1981). Second, these procedures apply only to informal rulemaking proceedings and are not in any sense intended to affect the more stringent ex parte rules applicable to agency adjudications and formal rulemakings. (Such proceedings are expressly intended by Congress to be more in the nature of formal judicial proceedings and involve bars against various forms of ex parte communication.)